

DRUGGED DRIVING CONFERENCE

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Voir Dire and Jury Selection

Presented by:

Beth Barnes

TSRP GOHS/Assistant Phoenix City Prosecutor

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ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
3838 N. Central Ave, Suite 850
Phoenix, Arizona 85012

ELIZABETH BURTON ORTIZ
EXECUTIVE DIRECTOR

JURY SELECTION

Purpose

Many purposes of jury selection have been given by various presentations and jury selection guides. These include: establishing rapport and credibility, educating the jurors, addressing weaknesses of the case, exposing the potential juror's biases and prejudice, understanding the potential juror's values, communicating, persuading, and observing. But of course the main purpose is to pick a fair jury.

Jury selection may be better described as jury de-selection. The attorney's actions are directed at striking jurors.

Prepare Voir Dire as Much as Possible Before the Process Begins

Write out the specific questions you want the court to read to the entire panel. These are generally more likely to be asked if they are typed and provided to the court. Provide legal support for your request if possible. You may want to prepare multiple versions just in case your preferred version is rejected.

Prepare a preliminary list of general questions for the individual questioning of potential jurors

First Impressions Matter

Jury selection is usually when the jurors form their first impressions. Consider how you want them to perceive you. Remember, voir dire should be more like an interview than a cross-examination.

The jury is always watching. Act accordingly.

The Prosecutor May want to Ask the Officer to Assist with Jury Selection

They are generally good at observation and assessing individuals. They may provide good insight. Of course, the decision of who to strike is the prosecutors.

TOP 10 Don'ts for Jury Selection (provided by APAAC)

10. Interrogate or cross-examine the jury panel
9. Bond or focus attention on only a few jurors
8. Ignore weaknesses in your case, with your witnesses, etc.

7. Fail to ask any questions during voir dire
6. Fail to use supplemental jury questionnaires if appropriate.
5. Talk down to potential jurors
4. Fail to keep an open mind
3. Fail to use good social skills
2. Fail or prepare for jury selection
1. Fail to believe jury selection is important

Evaluate Who the Potential Jurors Are

Some have used the categories of leaders, followers and loose cannons or loaners. Others have referred to them as persuaders, participants or non-participants. Either way, one needs to evaluate who is likely to effectively convince others to see their views and which are more likely to follow the leaders. Are there some who are totally unpredictable or appear to have a bad attitude?

Also evaluate the jurors, close friends and family member's personal experiences as related to the issues in the case. Is this potential juror likely to be biased against the case? Does this person have expertise that will make him/her more or less likely to follow the evidence?

Considerations When Preparing Voir Dire Questions

Tailor them to the type of case and case specific facts. Your opening statement can often provide guidance as can the jury instructions you have prepared as these may focus on issues in the case. Consider what you want to teach and whether you want to use your theme of the case. What tone do you want to set? How can you peak interest?

Open-ended questions tend to elicit more information from the potential jurors than other types of questions. Be sure to follow-up when helpful. Ask the potential juror to tell you more about the topic. Jury selection will be new and uncomfortable for many of them. Start with basic questions to put the potential juror at ease. For example, you may want to start with questions about the person's occupation.

You May Need to Respond to Actions of the Defense Attorney

Respond to attorneys voir dire questions if needed. Object when necessary. (Be cognizant of the fact that jurors may be able to see and hear). If you have to question the juror first, be pro-active to defense tactics that have already been demonstrated during the selection process for this case.

Challenges for Cause

Move to strike for cause those who have demonstrated they cannot be fair. Be able to articulate your reasons to the court. Be credible with your requests. Take thorough notes to allow you to articulate your reasons and to respond to defense challenges. Concede those that obviously should be struck.

Peremptory Strikes

Evaluate the potential juror's personal experience as well as close friends and family as it relates to the case. Evaluate their attitudes, beliefs, leadership potential and expertise. Who will be a problem? Rank the potential jurors based on things such as: likelihood of bias, leadership potential, and predictability. Remember the Rule of 11. You should not waive your strikes if you need them; even if it means more potential jurors will need to be drawn from the jury pool.

Potential Ideas for Marijuana DUI Cases

- Marijuana use (them, family, close friends)
 - When?
 - Did they drive after?
- Medical marijuana card holders?
- Marijuana attitudes - should it be totally legal?
- (A)(3) does not require impairment
- Spice/synthetic marijuana use and attitudes
- Do they believe marijuana does not impair driving?
- Member of any organization working to legalize?
- Medical marijuana card is not a defense to the (A)(1) charge

- Do they believe one under influence of marijuana acts the same as one impaired by alcohol?
- Do they believe marijuana 20 – 30 years ago is the same as that used now?

Potential Ideas for Prescription Drug DUIs

- Use of prescription/illegal drugs – drive after?
- Should all drug(s) be legal
- Metabolites
- 28-1381(B)
- Prescription is not a defense to (A)(1)
- (A)(3) does not require impairment – will they follow the law?
- A prescription is only a defense to (A)(3) if taken as prescribed
- Have they taken anyone else's prescriptions?
- Attitudes & familiarity with specific drug & drug category
- Who has chronic pain? Take medications for it? What type? Drive after?
- No tox results
- Warnings
- Combos
- Case specific questions

Excerpt from the Phoenix City Prosecutor DUI Manual

21.2 JURY SELECTION – BATSON CHALLENGES

No party may exercise peremptory jury challenges for discriminatory reasons. The seminal case in this area is *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, during jury selection of the trial of a black defendant, the prosecutor used peremptory challenges to strike all four black persons from the jury panel. As a result, this left an all white jury. The United States Supreme Court declared, “the Equal Protection

Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89.

In *Purkett v. Elem*, 514 U.S. 765, 767 (1995)(per curiam) the Supreme Court outlined the Batson three-step process to determine whether the State has used its peremptory challenges for purposeful discrimination:

(1) The opponent of a peremptory challenge must make a *prima facie* case of purposeful discrimination.

(2) If the *prima facie* case is made, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation for the challenged peremptory strike.

(3) The trial court must then decide whether the opponent of the strike has proved purposeful discrimination.

21.3 EXPANSION OF BATSON PRINCIPLES

The same equal protection principles protected in *Batson* for race, also apply to peremptory strikes based upon national origin and gender. *Hernandez v. New York*, 500 U.S. 352 (1991); *J.E.B. v. Alabama*, 511 U.S. 127 (1994)). *Batson* challenge protections have even been extended to geographical subgroups of gender. *State v. Lucas*, 199 Ariz. 366, 369, 18 P.3d 160, 163 (App. 2001). In *Lucas*, the prosecutor struck a black juror for two reasons:

- (1) He was a lawyer, and she never left lawyers on her juries, and
- (2) "He's from the south . . . I have a problem with males from the south having prejudice against women working, [while they are pregnant]"

Id. at 368, P.3d at 162. The *Lucas* Court noted both the prosecuting attorney and the victim were pregnant at the time of trial. *Id.*

The Arizona Court of Appeals found the first explanation to be race neutral, but the second reason was "an unacceptable anecdotal generalization without a basis in fact." *Id.* The court stated, "If one cannot discriminate against males, it follows that one cannot discriminate against a geographical subgroup of males." *Id.* at 369, P.3d at 163

The Supreme Court has held that the equal protection clause applies to the peremptory challenges by criminal defendants. *Georgia v. McCollum*, 505 U.S. 42 (1992). The *McCollum* Court noted, "Peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial." *Id.* at 57. The same three-step *Batson* process is used to evaluate a defendant's peremptory challenges.

Arizona has extended *Batson* challenges to religion. *State v. Purcell*, 199 Ariz. 319, 18 P.3d 113 (App. 2001). In *Purcell*, the defense challenged the peremptory strike of a Hispanic, Catholic juror who was a secretary for the Catholic Diocese of Phoenix and who expressed opposition to the death penalty. The Arizona Court of Appeals stated:

[W]e believe that *Batson* and *J.E.B.*, pursuant to the [First and Fourteenth Amendments](#), prohibit the use of peremptory strikes based upon one's religious affiliation but not based upon one's relevant opinions, although such opinions may have a religious foundation.

Purcell, 199 Ariz. at 328, 18 P.3d at 122. The court found the peremptory strike of the juror in question did not violate *Batson* because it was based on the juror's personal beliefs, not religious affiliation. *Id.*

STATE'S REQUESTED INSTRUCTION

A.R.S. § 28-1381(A)(1) Prescription is Not a Defense

It is not a defense to a charge of A.R.S. § 28-1381(A)(1) that a person is or has been entitled to use a drug under the laws of this state. You may not consider whether the defendant had a valid prescription or was taking drugs as prescribed in determining whether the defendant was impaired to the slightest degree by the drugs in his/her system.

Source A.R.S. § 28-1381(B)

STATE'S REQUESTED LIMITING INSTRUCTION

You may not consider whether the defendant had a valid prescription for the drugs/metabolites alleged to have been found in his/her blood or was taking them as prescribed when deciding whether the defendant was impaired to the slightest degree under the A.R.S. § 28-1381(A)(1) charge.

28.1381(A)(3) – Driving or Actual Physical Control While There Is a Drug in the Defendant's Body (RAJI)

The crime of driving or actual physical control while there is a drug in the defendant's body requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [driving] [being in actual physical control of] the vehicle.

28-1381(A)(3) - DRIVING WITH AN ILLEGAL DRUG (variation)

The crime of driving or actual physical control while there is a drug in the defendant's body requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. That at the time of driving (actual physical control), a drug defined in section 13-3401, or its metabolite, was in the Defendant's body.

Include in jury instruction that the drug/s are listed in A.R.S. § 13-3401

For example

Alprazolam is a drug defined in A.R.S. § 13-3401.

Instructions for the Affirmative Defense.

STATE'S REQUESTED INSTRUCTIONS

A.R.S. § 28-1381(A)(3) & A.R.S. § 28-1381(D) Affirmative Defense Instruction

It is a defense to the A.R.S. § 28-1381(A)(3) charge that the defendant was taking the drugs in his or her system "as prescribed." If you find that the defendant had a drug or drugs defined in section 13-3401 or their metabolites in his/her body while driving or being in actual physical control then you must decide whether the defendant has proven that he/she was using each of those drugs "as prescribed" by a licensed medical practitioner.

It is the defendant's burden to prove this defense by a preponderance of the evidence. You must find the defendant not guilty of the A.R.S. § 28-1381(A)(3) charge if you find by a preponderance of the evidence that the defendant was using each of the drugs you have found to be in his s/her system pursuant to a valid prescription issued by a licensed physician and that each was used "as prescribed."

Source: *State v. Bayardi (Fannin, RPI)*, 230 Ariz. 195, 281 P.3d 1063 (App. 2013); A.R.S. § 28-1381(D)

A.R.S. § 28-1381(A)(3) A.R.S. § 28-1381(D) Affirmative Defense Instruction (variation)

It is a defense to the A.R.S. § 28-1381(A)(3) charge that the defendant was taking the drugs in his or her system "as prescribed." If you find that the defendant had a drug or drugs defined in section 13-3401 or their metabolites in his/her body while driving or being in actual physical control then you must decide whether the defendant was using those drugs "as prescribed." It is the defendant's burden to prove this defense by a preponderance of the evidence. You must find the defendant not guilty of the A.R.S. § 28-1381(A)(3) charge if you find by a preponderance of the evidence that the defendant was using any and all drugs defined in section 13-3401 that were in his/her system while driving "as prescribed."

Source: *State v. Bayardi (Fannin, RPI)*, 230 Ariz. 195, 281 P.3d 1063 (App. 2013); A.R.S. § 28-1381(D)

Affirmative Defense derived from criminal RAJIS

The defendant has raised the affirmative defense of [using a drug as prescribed by a medical practitioner] with respect to the charged offense of driving or being in actual physical control of a vehicle while there is a drug defined in 13-3401 or it's metabolite in his system. The burden of proving each element of the offenses beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of using a drug as prescribed is on the defendant. The defendant must prove the affirmative defense of using a drug as prescribed by a preponderance of the evidence. If you find that the defendant has proven the affirmative defense of using a drug as prescribed by a preponderance of the evidence you must find the defendant not guilty of the offense of driving or being in actual physical control of a vehicle while there is a drug defined in 13-3401 or it's metabolite in his system.

Preponderance of the evidence Standard Criminal 5b(2) – Standards for the Burden of Proof

Preponderance of the Evidence – A party having the burden of proof by a preponderance of the evidence must persuade you, by the evidence, that the claim or a fact is more probably true than not true. This means the evidence that favors that party outweighs the opposing evidence.

STATE'S REQUESTED INSTRUCTION

A.R.S. § 28-1381(A)(1) Medical Marijuana Card is Not a Defense

It is not a defense to a charge of A.R.S. § 28-1381(A)(1) that a person is or has been entitled to use a drug under the laws of this state. You may not consider whether the defendant had a valid medical marijuana card in determining whether the defendant was impaired to the slightest degree by the drugs in his/her system.

Source A.R.S. § 28-1381(B)

STATE'S REQUESTED LIMITING INSTRUCTION

You may not consider whether the defendant had a valid medical marijuana card in determining whether the defendant was impaired to the slightest degree by the drugs in his/her system under the A.R.S. § 28-1381(A)(1) charge.

Source A.R.S. § 28-1381(B)

28.1381(A)(3) – Driving or Actual Physical Control While There Is a Drug in the Defendant's Body (RAJI)

The crime of driving or actual physical control while there is a drug in the defendant's body requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [driving] [being in actual physical control of] the vehicle.

28-1381(A)(3) - DRIVING WITH AN ILLEGAL DRUG (variation)

The crime of driving or actual physical control while there is a drug in the defendant's body requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. That at the time of driving (actual physical control), a drug defined in section 13-3401, or its metabolite, was in the defendant's body.

Include in jury instruction that the drug/s are defined in A.R.S. § 13-3401

For example

Cannabis is a drug defined in A.R.S. § 28-13-3401. OR

Hydroxy THC is a metabolite of Cannabis which is a drug defined in A.R.S. § 13-3401.

Instructions for the Affirmative Defense.

STATE'S REQUESTED INSTRUCTIONS

A.R.S. § 28-1381(A)(3) Medical Marijuana Affirmative Defense Instruction

It is a defense to the A.R.S. § 28-1381(A)(3) charge that the marijuana or marijuana metabolite in the defendant's system was authorized by the Arizona Medical Marijuana Act (AMMA) and in a concentration insufficient to cause impairment. If you find that the defendant had marijuana or its active metabolite [or a drug or drugs defined in section 13-3401 or their metabolites] in his/her body while driving or being in actual physical control you must then decide:

- 1) whether the defendant's use of marijuana was authorized by the AMMA and;
- 2) whether the defendant has proven that the concentration was insufficient to cause impairment.

There is a presumption that the defendant's use was authorized by the AMMA if the defendant was in possession of a registry identification card and no more than 2.5 ounces of marijuana on the date of violation. [This presumption disappears if rebutted with evidence the use of marijuana was not for the purpose of treating or alleviating the debilitating medical condition or symptoms associated with the condition.]

It is the defendant's burden to prove this defense by a preponderance of the evidence. You must find the defendant not guilty of the A.R.S. § 28-1381(A)(3) charge if you find by a preponderance of the evidence that the concentration of marijuana or its metabolite was in an insufficient concentration to cause impairment.

Source: *Dobson v. McClennen (City of Mesa, RPI)*, 238 Ariz. 389 (2015); A.R.S. §§ 36-2811(A)(1); 36-2802(D).

Instructions for the Affirmative Defense.

STATE'S REQUESTED INSTRUCTIONS

A.R.S. § 28-1381(A)(3) Medical Marijuana Affirmative Defense Instruction

It is a defense to the A.R.S. § 28-1381(A)(3) charge that the marijuana or its metabolite in the defendant's system was in a concentration insufficient to cause impairment. If you find that the defendant had a drug or drugs defined in section 13-3401 or their metabolites in his/her body while driving or being in actual physical control you must then decide whether the defendant has proven that that the concentration was insufficient to cause impairment.

It is the defendant's burden to prove this defense by a preponderance of the evidence. You must find the defendant not guilty of the A.R.S. § 28-1381(A)(3) charge if you find by a preponderance of the evidence that the concentration of marijuana or its metabolite was in an insufficient concentration to cause impairment.

Source: *Dobson v. McClennen (City of Mesa, RPI)*, 238 Ariz. 389 (2015); A.R.S. § 36-2802(D)

NOTE: only given if the person has proven his/her use was authorized by the AMMA (in possession of a registry identification card and 2.5 ounces or less) A.R.S. § 36-2811(A)(1); *Dobson*. This establishes a presumption. The presumption disappears if rebutted with evidence conduct was not for purpose of treating or alleviating the debilitating medical condition or symptoms associated with the condition. [§ 36-2811(2)]. If rebutted defense should not be allowed.

RAJI Medical Marijuana Affirmative Defense Instruction

36.2802(D) Affirmative Defense of Insufficient Concentration of Marijuana to Cause Impairment

The defendant has raised the affirmative defense that the marijuana, or its metabolite, was not present in a sufficient quantity to cause impairment with respect to the charged offense of driving or actual physical control while there is marijuana in the defendant's body. The defendant must prove both of the following:

1. The defendant's use was authorized by the Arizona Medical Marijuana Act (AMMA), and
2. The marijuana, or any metabolite, found in defendant's body was present in an insufficient concentration to cause impairment.

The burden of proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of insufficient concentration to cause impairment is on the defendant. The defendant must prove the affirmative defense of insufficient concentration to cause impairment by a preponderance of the evidence.

If you find that the defendant has proven the affirmative defense of insufficient concentration to cause impairment by a preponderance of evidence, you must find the defendant not guilty of the offense of driving or actual physical control while there is marijuana in the defendant's body.

If the defendant was a Medical Marijuana cardholder at the time of the offense, the defendant's use is presumed to be authorized by AMMA. The State may rebut this presumption.

A.R.S. § 28-1381(A)(3) Medical Marijuana Affirmative Defense Instruction - derived from criminal RAJIS 2.025

The defendant has raised the affirmative defense of being an authorized medical marijuana user with a concentration of THC or its metabolite insufficient to cause impairment with respect to the charged offense of driving or being in actual physical control of a vehicle while there is a drug defined in 13-3401 or its metabolite in his system. The burden of proving each element of the offenses beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of being an authorized medical marijuana user with a concentration of THC or its metabolite insufficient to cause impairment is on the defendant. The defendant must prove that he/she was an authorized medical marijuana user with a concentration of THC or its metabolite in insufficient concentration to cause impairment by a preponderance of the evidence. If you find that the defendant has proven the affirmative defense of being an authorized medical marijuana user with a concentration of THC or its metabolite insufficient to cause impairment by a preponderance of the evidence you must find the defendant not guilty of the offense of driving or being in actual physical control of a vehicle while there is a drug defined in 13-3401 or its metabolite in his system.

A.R.S. § 36-2801(17) Visiting Qualifying Patient Instruction (for out-of-state cards)

An out-of-state medical marijuana card may qualify a person as an authorized user of marijuana under the Arizona Medical Marijuana act if he/she is a Visiting Qualifying Patient. A Visiting Qualifying Patient is a person who:

- 1) is not an Arizona resident or had been an Arizona resident for less than thirty days on the date of violation and;
- 2) was diagnosed with a debilitating medical condition by a person licensed in the person's state of residence or, in the case of a person who has been a resident of Arizona less than thirty days, the state of the person's former residence.

"Debilitating medical condition" means one or more of the following:

- a) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, crohn's disease, agitation of alzheimer's disease or the treatment of these conditions.
- b) A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including those characteristic of epilepsy; or severe and persistent muscle spasms, including those characteristic of multiple sclerosis.

It is the defendant's burden to prove, by a preponderance of the evidence, that he/she is a Visiting Qualifying Patient.

Source: A.R.S. §§ 36-2801(17) & (3)

Preponderance of the evidence Standard Criminal 5b(2) – Standards for the Burden of Proof

Preponderance of the Evidence – A party having the burden of proof by a preponderance of the evidence must persuade you, by the evidence, that the claim or a fact is more probably true than not true. This means the evidence that favors that party outweighs the opposing evidence.

MORE SIMPLE VERSIONS COURTESY OF MESA

ARS 28-1381A3 Affirmative Defense – Concentration Insufficient to Cause Impairment¹

It is an affirmative defense to ARS 28-1381(A)(3) if the evidence against Defendant consists solely of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment. It is the defendant's burden to prove this defense by a preponderance of the evidence.

Source: Dobson v. McClennen, 238 Ariz. 389, 361 P.3d 374 (2015).

Drug Defined in 13-3401

Cannabis, Marijuana, and Tetrahydrocannabinol (THC) are drugs defined in 13-3401. THC is the primary active component of Marijuana.

Source: ARS 13-3401 (19); (20)(w); (4)(b).

Affirmative Defense – Burden on Defendant

The burden of proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense is on the defendant. The defendant must prove the affirmative defense by a preponderance of the evidence.

Source: A.R.S. § 13-205 (A); RAJI Standard Criminal 2.025

Preponderance of the Evidence

A party having the burden of proof by a preponderance of the evidence must persuade you, by the evidence, that the claim or a fact is more probably true than not true. This means the evidence that favors that party outweighs the opposing evidence.

Source: RAJI Standard Criminal 5b(2)

¹ Affirmative Defense instructions should be given only after Defendant has established the defense by presenting evidence.